Cooperation between Law Enforcement and State Hospitals in Warrantless, Nonconsensual Drug Testing of Maternity Patients Is Unconstitutional under the Fourth Amendment: *Ferguson v. City of Charleston*

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Cooperation Between Law Enforcement and State Hospitals in Warrantless, Nonconsensual Drug Testing of Maternity Patients is Unconstitutional Under the Fourth Amendment: *Ferguson v. City of Charleston*

**CONSTITUTIONAL LAW — FOURTH AMENDMENT — FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE — SPECIAL NEEDS DOCTRINE** — The United States Supreme Court held that a state hospital's policy of drug testing maternity patients without their consent, in conjunction with law enforcement, constitutes an unreasonable search prohibited by the Fourth Amendment to the United States Constitution; the state's interest in deterring pregnant women from drug use does not justify variance from the general rule that official nonconsensual searches are unconstitutional if not executed according to and accompanied by a valid search warrant.

*Ferguson v. City of Charleston*, 532 U.S. 67 (2001)

In April of 1989, a public hospital in Charleston operated by the Medical University of South Carolina ("MUSC") began performing drug tests on the urine samples of maternity patients that the staff suspected of cocaine use.\(^1\) This practice was the MUSC staff's response to the noted increase in cocaine use among maternity patients at that particular facility, and the nationally perceived "crack baby" epidemic of the 1980's.\(^2\) Initially, prenatal patients that tested positive for cocaine use were merely referred to the County Substance Abuse Commission.\(^3\)

The staff noted no decrease in prenatal cocaine use.\(^4\) Upset with the lack of progress, an MUSC obstetrics nurse and an MUSC attorney contacted the Charleston Solicitor to offer the hospital's cooperation in efforts to prosecute drug-using mothers-to-be.\(^5\) The

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\(^2\) Ferguson, 532 U.S. at 70 n.1. At trial, witnesses testified about the "crack baby epidemic." *Id.*

\(^3\) *Id.* at 70. The "initial phase" of the testing program lasted approximately four months. *Id.*

\(^4\) *Id.*

\(^5\) *Id.* at 70-71. The nurse was Shirley Brown, the obstetrics department case manager at the Medical University of South Carolina. *Id.* She was prompted to action by a news story she heard regarding arrests of drug-using pregnant women in Greenville, South Carolina. *Id.*
offer prompted the Solicitor to initiate development of a cooperative effort whereby the staff of MUSC, the Charleston police, the County Substance Abuse Commission, and the Department of Social Services would identify substance-abusing maternity patients and use the leverage of law enforcement to get them into treatment and keep them there.  

Led by the Charleston Solicitor, the various participants created a written plan for action entitled "Policy M-7." Under Policy M-7, admitted pregnant patients were scrutinized under nine criteria. Satisfaction of one or more of these criteria subjected the pregnant patient to a urine screening for cocaine. Following the urine test, Policy M-7 mandated maintenance of a strict chain of custody for evidentiary purposes. Patients who tested positive were to be referred to substance abuse treatment and counseling. Refusal of treatment, missed treatment, or a second positive test resulted in police notification and subsequent arrest. Finally, Policy M-7 detailed specific offenses with which uncooperative expecting mothers could be charged, and instructed police to interrogate those arrested to discover the suppliers of cocaine. Beyond the initial prescription of drug treatment, Policy M-7 did not alter MUSC's prenatal care of mother or child.

The collaboration between MUSC and the authorities continued for five years. During that period, approximately 253 pregnant

The MUSC attorney she consulted was Joseph C. Good, Jr., and the Charleston Solicitor at the time was Charles Condon. Id.

6. Id. at 71.
7. Ferguson, 532 U.S. at 71.
8. Id. These nine criteria appeared in the first section of Policy M-7 entitled "Identification of Drug Abusers." Id. The nine criteria were: (1) no prenatal care; (2) late prenatal care after 24 weeks gestation; (3) incomplete prenatal care; (4) abruptio placenta; (5) intrauterine fetal death; (6) preterm labor of no obvious cause; (7) intrauterine growth retardation of no obvious cause; (8) previously known drug or alcohol abuse; and (9) unexplained congenital anomalies. Id. at 71 n.4.
9. Id. at 71.
10. Id. at 71-72. Chain of custody is defined as "[t]he movement and location of real evidence from the time it is obtained to the time it is presented in court. The history of a chattel's possession." BLACK'S LAW DICTIONARY 222 (7th ed. 1999).
11. Ferguson, 532 U.S. at 72.
12. Id. at 72.
13. Id. at 72-73. If the patient was in her twenty-seventh week of pregnancy or earlier, Policy M-7 instructed that she be charged with simple cocaine possession. Id. For expectant mothers in the twenty-eighth week and beyond, there were to be additional charges for distribution to a person under the age of 18. Id. Finally, if illegal drugs were found in the patient's system during delivery, she was to be charged with child neglect. Id.
14. Id. at 73.
15. Jean R. Schroedel & Pamela Fiber, Punitive Versus Public Health Oriented Responses to Drug Use by Pregnant Women, 1 YALE J. OF HEALTH POL'Y, L & ETHICS 217, 219
women tested positive and thirty of those women were arrested.\textsuperscript{16} Ten of the arrested women brought a three million dollar damages suit in the United States District Court for the District of South Carolina, at Charleston, naming as defendants the City of Charleston, the trustees of MUSC, and various individual participants in the implementation of the policy.\textsuperscript{17}

In their complaint, the arrested mothers challenged the constitutionality of Policy M-7, alleging that the drug tests it authorized constituted warrantless, nonconsensual searches by state officials, for criminal investigatory purposes, in violation of the Fourth Amendment protection against unreasonable searches and seizures.\textsuperscript{18} In response, the hospital and Charleston law enforcement officials contended that the plaintiffs had, in fact, consented to the searches, and that even if they had not consented, the searches were reasonable because they were justified by special non-law enforcement needs.\textsuperscript{19}

The district court refused to submit the “special needs” defense to the jury because of police involvement in the searches (the searches were not done solely for the benefit of MUSC).\textsuperscript{20} The trial court did submit to the jury the factual question regarding consent.\textsuperscript{21} The jury was instructed to decide in favor of the pregnant women unless they found that the women had in fact consented.\textsuperscript{22} The jury found consent and returned a verdict for the hospital and the law enforcement officials.\textsuperscript{23} The mothers appealed, contesting the sufficiency of the evidence supporting the jury's


\textsuperscript{18} \textit{Ferguson}, 532 U.S. at 73. The Fourth Amendment's grant of protection reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." \textit{U.S. CONST.} amend. IV.

\textsuperscript{19} \textit{Ferguson}, 532 U.S. at 73.

\textsuperscript{20} \textit{Id.} at 73-74.

\textsuperscript{21} \textit{Id.} at 74.

\textsuperscript{22} \textit{Id.} The jury instruction was:

There were no search warrants issued by a magistrate or any other proper judicial officer to permit these urine screens to be taken. There not being a warrant issued, they are unreasonable and in violation of the Constitution of the United States, unless the Defendants have shown by the greater weight or preponderance of the evidence that the Plaintiffs consented to those searches. \textit{Id.} at 74 n.6.

\textsuperscript{23} \textit{Id.} at 74.
The Fourth Circuit Court of Appeals affirmed but did not rule on the consent issue. Instead, the court of appeals held that the drug tests performed by MUSC were reasonable searches as a matter of law. The majority purported to follow a line of United States Supreme Court cases holding that in extraordinary instances, "special needs" may justify a warrantless search for non-law-enforcement purposes. The appellate majority deemed the urine testing to be a "minimal intrusion" on patient privacy, and found that the health risks and financial burdens sought to be avoided by the searches qualified as outweighing "special needs."

The United States Supreme Court granted certiorari to decide whether MUSC's nonconsensual drug testing policy in conjunction with law enforcement violated the petitioners' Fourth Amendment rights, and to review the Fourth Circuit's application of the special needs doctrine.

Justice Stevens authored the majority opinion. The Court held that the Fourth Circuit improperly applied the doctrine of special needs, and that Policy M-7 was state action in violation of the petitioners' Fourth Amendment right to be free from unreasonable searches.

Justice Stevens began by dispensing with some preliminary and postural matters. First, he denoted that the Medical University of South Carolina is a state hospital, and as such, its employees are to be considered government actors subject to Fourth Amendment controls. Second, Justice Stevens confirmed that the MUSC drug tests were clearly searches as defined by the Fourth Amendment. Third, the majority noted that the Court must assume that the tests were performed without the patients' informed consent because the district court and the court of appeals both viewed the case as "one involving MUSC's right to conduct searches without warrants or probable cause."

24. Ferguson, 532 U.S. at 74.
25. Ferguson, 186 F.3d at 469.
26. Id. at 476.
27. Id. at 476-79.
28. Id. at 479.
30. Ferguson, 532 U.S. at 69. Justice Stevens was joined by Justices O'Connor, Souter, Ginsburg, and Breyer. Id.
31. Id. at 85-86.
32. Id. at 76.
33. Id.
34. Id.
35. Ferguson, 532 U.S. at 76-77.
Having dispensed with these preliminary matters, the majority distinguished *Ferguson* from four prior cases in which the Court considered whether similar drug tests fell within what it has called a "closely guarded category of constitutionally permissible suspicionless searches." The majority found the distinguishing factor to be MUSC's insistence that it had the authority to turn drug test results over to the police without informing the patients. No case had previously sought to justify this type of action. In fact, the Court pointed out that the tests performed in the previous cases had in fact maintained protections against the disclosure of results to third parties.

Justice Stevens continued the Court's analysis by relaying how in the previous cases, the special needs which supported suspicionless drug testing were balanced against the degree of intrusion into the individuals' privacy. The majority found the intrusion into the privacy of the maternity patients at MUSC to be far greater than in prior fact patterns. The Court opined that medical patients have an expectation of privacy different from that of previous petitioners. In addition to finding that the intrusion was greater and the privacy interest was distinguishable, the Court found the nature of the purported "special needs" to be less compelling than in previous cases because the needs were too closely related to the general interests of law enforcement. The majority cited this as the factor that truly distinguished the instant case from others in the "special needs" line.

Justice Stevens held that the weight of the evidence supported

36. Id. at 77 (citing Chandler v. Miller, 520 U.S. 305, 309 (1997)). The four cases the Court referred to were Chandler v. Miller, 520 U.S. 305 (1997); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); Treasury Employees v. Von Raab, 489 U.S. 656 (1989); and Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995), discussed infra. Id.

37. Id. at 77.

38. Id. at 78.

39. Id.

40. Ferguson, 532 U.S. at 78.

41. Id.

42. Id. In reaching this determination, the Court relied on the *amicus curiae* briefs of the American Medical Association and the American Public Health Association. Id. "The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." Id.

*Amicus Curiae* is Latin for "friend of the court" and is defined as a "person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter." BLACK'S LAW DICTIONARY 83 (7th ed. 1999).

43. Ferguson, 532 U.S. at 79-80.

44. Id. at 79.
the conclusion that the primary aims of Policy M-7 were prosecutorial, not medical. In coming to this conclusion, the majority gave weight to several factors. First, the Court was moved by the fact that law enforcement was consulted and involved not only in the implementation or consequences of the policy, but also was an advocate and indeed an architect of the plan from its very inception. Second, Policy M-7 itself expended more of its pages providing for possible criminal charges, police procedures, and maintenance of a chain of custody than for varied treatment and additional attempts to wean the pregnant women from cocaine. Third, the police were actively involved, being granted access to patients' files, and coordinating all moves with the staff of MUSC.

The majority reasoned that though one focus of the program may have been to cure pregnant women of their cocaine addictions, the more immediate goal of Policy M-7 was to "generate evidence for law enforcement purposes." Having come to this conclusion, the Court held that the broad objectives of law enforcement in general could not serve as the justification for such non-consensual, warrantless searches because, if held otherwise, virtually all non-consensual, warrantless searches could be justified, and therefore constitutional, on such grounds. The Court concluded that such a result would not square with Fourth Amendment protections. Accordingly, the Court reversed the judgment of the Fourth Circuit and remanded the case for further proceedings consistent with the opinion.

Justice Kennedy concurred, reaching the same conclusion but for

45. Id. at 81.
46. Id. at 82. The Court relayed that "throughout the development and application of the policy, the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy." Id.
47. Id. Justice Stevens wrote:
Tellingly, the document codifying the policy incorporates the police's operational guidelines. It devotes attention to the chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests. Nowhere, however, does the document discuss different courses of medical treatment for either mother or infant, aside from treatment for the mother's addiction.
48. Ferguson, 532 U.S. at 82. The majority noted that "[i]n the course of the policy's administration, [the police] had access to Nurse Brown's medical files on the women who tested positive, routinely attended the substance abuse team's meetings, and regularly received copies of team documents discussing the women's progress." Id.
49. Id. at 82-83.
50. Id. at 84.
51. Id.
52. Id. at 86.
different reasons. The first part of the concurring opinion disagreed with the majority's position that Policy M-7's immediate purpose (law enforcement), as opposed to its ultimate purpose (weaning expectant mothers from drugs), was the appropriate target for "special needs" examination. Kennedy commented that this approach lacked support in the Court's "special needs" precedents. He suggested that all search policies have an immediate goal of obtaining evidence, and that all prior cases have necessarily focused on what the majority deemed to be the "ultimate goal," therefore, the "special needs" examination in the Ferguson case should also concentrate on the policy's "ultimate goal."

Despite the aforementioned reservations, Justice Kennedy agreed, in the second part of his concurrence, that Policy M-7 had to be struck down under the Fourth Amendment. He too cited the high degree of law enforcement involvement as the distinguishing factor not supported by the "special needs" line of cases. Justice Kennedy went so far as to call the respondent hospital an "institutional arm of law enforcement." Furthermore, Justice Kennedy clearly expressed his view that the Ferguson holding was limited to the facts of the instant case. Also, he reaffirmed the existence of a strong governmental interest in the health of unborn children and the validity of some other various mandatory reporting laws.

Finally, in the third part of his concurrence, Justice Kennedy found significant the lack of a decision below on the issue of consent. Justice Kennedy predicted that if consent had been at issue, the case might have been resolved differently.

53. Ferguson, 532 U.S. at 86 (Kennedy, J., concurring).
54. Id. at 86-87 (Kennedy, J., concurring).
55. Id. at 87 (Kennedy, J., concurring).
56. Id. (Kennedy, J., concurring). Justice Kennedy compared the immediate goals with the ultimate goals in Skinner, 489 U.S. at 602; Von Raab, 489 U.S. at 656; and Acton, 515 U.S. at 646, discussed infra. Id. at 87 (Kennedy, J., concurring).
57. Id. at 88 (Kennedy, J., concurring).
58. Ferguson, 532 U.S. at 88 (Kennedy, J., concurring).
59. Id. (Kennedy, J., concurring).
60. Id. at 89 (Kennedy, J., concurring).
61. Id. at 89-90 (Kennedy, J., concurring). Justice Kennedy offers, as an example, laws which require teachers to report suspected instances of child abuse. Id. at 90 (Kennedy, J., concurring).
62. Id. at 91 (Kennedy, J., concurring).
63. Ferguson, 532 U.S. at 91 (Kennedy, J., concurring). Justice Kennedy indicated that "[a]n essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences . . . will follow from refusal." Id. at 90-91 (Kennedy, J., concurring). He
The lone dissent, written by Justice Scalia, quarrelled with even the initial assumptions of the majority.\textsuperscript{64} To Scalia, it was not at all clear that a search was at issue.\textsuperscript{65} Justice Scalia argued that the only conceivable search was the taking of the urine and, perhaps, the testing of it.\textsuperscript{66} He stressed that these activities were not being challenged so much as the non-searching act of handing the results over to law enforcement officials.\textsuperscript{67}

Justice Scalia proceeded to delve into the consent issue passed on by the majority.\textsuperscript{68} Because there was no evidence or contention that the urine was procured by physical force, Justice Scalia offered that only three other circumstances exist in which the urine samples could be said to have been obtained without consent.\textsuperscript{69} Consent had to either be: (1) coerced by a general need for medical treatment; (2) uninformed in that the patients were not told of the intended testing; or (3) uninformed in that the patients were not told that the police would become involved.\textsuperscript{70}

According to Justice Scalia, the latter two types of consent would not even be considered deficient under Fourth Amendment precedent.\textsuperscript{71} He referred to a line of cases that suggest that "the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."\textsuperscript{72} Justice Scalia contended that Ferguson was the first time that the Court had suggested that the police could not use incriminating evidence obtained after someone voluntarily gave it up.\textsuperscript{73} Justice Scalia would have held "that information obtained through violation of a relationship of trust is

\begin{enumerate}
\item\textsuperscript{64} Id. (Scalia, J., dissenting).
\item\textsuperscript{65} Id. at 92 (Scalia, J., dissenting).
\item\textsuperscript{66} Id. (Scalia, J., dissenting). "What petitioners, the Court, and to a lesser extent the concurrence really object to is not the urine testing, but the hospital's reporting of positive drug-test results to police. But the latter is obviously not a search." Id. (Scalia, J., dissenting).
\item\textsuperscript{67} Id. (Scalia, J., dissenting).
\item\textsuperscript{68} Ferguson, 532 U.S. at 93 (Scalia, J., dissenting).
\item\textsuperscript{69} Id. (Scalia, J., dissenting).
\item\textsuperscript{70} Id. (Scalia, J., dissenting).
\item\textsuperscript{71} Id. at 94 (Scalia, J., dissenting).
\item\textsuperscript{72} Id. (Scalia, J., dissenting) (citing Hoffa v. United States, 385 U.S. 293, 302 (1966)). The line of cases that Justice Scalia referred to is the Hoffa line, stemming from Hoffa v. United States, 385 U.S. 293 (1966). Id. (Scalia, J., dissenting). Those cases hold that a when person voluntarily grants access to evidence, if the evidence in turn is obtained by law enforcement, the Fourth Amendment is not implicated. Id. (Scalia, J., dissenting). Therefore, violating someone's trust is not the same as a search. Id. (Scalia, J., dissenting).
\item\textsuperscript{73} Ferguson, 532 U.S. at 95 (Scalia, J., dissenting).
\end{enumerate}
obtained consensually, and is hence not a search." No other justices joined in this first part of Justice Scalia's opinion.

In the second part of his dissent, joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia reluctantly wrote under the assumption that the taking and testing of the urine constituted a warrantless nonconsensual search, making the special needs doctrine relevant. Justice Scalia insisted that even if this assumption was made, and the special needs doctrine were applied, the so-called "searches" at issue should be found constitutional.

Justice Scalia contended that the majority incorrectly viewed the purported medical purposes of Policy M-7 as mere pretext to the true motivations of law enforcement. The majority was not entitled to impose this view because the fact-finder had expressly determined the purpose of Policy M-7 to be providing for the health and drug treatment of mother and child. The dissenters found significance in the fact that some testing had begun without law enforcement influence or aid. Similariy, they were moved by the fact that originally, a referral to treatment was the immediate (not merely "ultimate") result of a positive drug screening. Justice Scalia and his co-dissenters failed to perceive why, once the police got involved, the majority believed that those original motives were no longer an immediate purpose for the policy.

The dissent asserted that no justification existed to distinguish the instant situation from situations that require medical personnel to report test results to law enforcement officials. Justice Scalia wrote that the majority's holding necessarily means that virtually any prosecutorial involvement renders the special needs doctrine inapplicable. Meanwhile, he claimed, the entire point of the

74. Id. at 96. See supra note 72.
75. Id. at 98 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined as to the second part of Justice Scalia's dissent. Id. (Scalia, J., dissenting).
76. Id. (Scalia, J., dissenting).
77. Id. (Scalia, J., dissenting).
78. Ferguson, 532 U.S. at 98-99 (Scalia, J., dissenting). Scalia averred that "[t]his finding is binding upon us unless clearly erroneous, see Fed. Rule Civ. Proc. 52(a). Not only do I find it supportable; I think that any other finding would have to be overturned." Id. (Scalia, J., dissenting).
79. Id. at 99 (Scalia, J., dissenting).
80. Id. (Scalia, J., dissenting).
81. Id. at 99-100 (Scalia, J., dissenting).
82. Id. at 100 (Scalia, J., dissenting). Justice Scalia was referring to situations where physicians come across possibly incriminating information quite inadvertently and are bound by professional regulations and ethical codes to report the same. Id. (Scalia, J., dissenting). See supra note 61 and accompanying text.
83. Ferguson, 532 U.S. at 100 (Scalia, J., dissenting).
special needs doctrine is, in certain necessitous situations, to "untie" the hands of law enforcement and allow their involvement.\textsuperscript{84}

In summary, the dissent maintained that law enforcement presence did not invalidate the medical objectives of MUSC.\textsuperscript{85} Justice Scalia analogized the facts at hand to a case in which the Court validated, under the special needs doctrine, a warrantless search by a probation officer who had received a tip that the parolee possessed a gun.\textsuperscript{86} In his final attempt to undercut the majority's conclusion that law enforcement purposes dominated Policy M-7 and its implementation, Justice Scalia directed attention to the fact that only thirty of the 253 women who tested positive under the policy were ever arrested, and only two were ever prosecuted.\textsuperscript{87} He concluded that this was not consistent with the majority's finding that Policy M-7's "immediate purpose" was crime control.\textsuperscript{88}

The "special needs" doctrine at issue in \textit{Ferguson} has its origins in a concurring opinion authored by Justice Blackmun in \textit{New Jersey v. T.L.O.}\textsuperscript{89} In that case, a fourteen-year-old girl was caught smoking cigarettes in her public school's bathroom.\textsuperscript{90} When she later denied the event, a principal searched her purse and discovered the cigarettes, a pipe, rolling papers, marijuana, and various other evidence suggesting drug usage and dealing.\textsuperscript{91} As a result, the student was suspended and the State of New Jersey brought delinquency charges against her.\textsuperscript{92}

The defendant moved to suppress the evidence uncovered by the search of her purse.\textsuperscript{93} She alleged that the search was an unconstitutional, warrantless, and unreasonable in violation of the Fourth Amendment, and that any evidence gathered therefrom was inadmissible.\textsuperscript{94} The Juvenile Court denied the motion, deemed the

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\textsuperscript{84} \textit{Id.} (Scalia, J., dissenting).
\textsuperscript{85} \textit{Id.} (Scalia, J., dissenting).
\textsuperscript{86} \textit{Id.} at 100-01 (Scalia, J., dissenting). Justice Scalia cited \textit{Griffin v. Wisconsin}, 483 U.S. 868 (1987). Justice Scalia summarized that in \textit{Griffin}, in affirming a denial of a motion to suppress, "[the Court] concluded that the 'special need' of assuring compliance with terms of release justified a warrantless search of petitioner's home." \textit{Id.} at 100-01 (Scalia, J., dissenting).
\textsuperscript{87} \textit{Id.} at 103 (Scalia, J., dissenting).
\textsuperscript{88} \textit{Ferguson}, 532 U.S. at 103-04 (Scalia, J., dissenting).
\textsuperscript{89} 469 U.S. 325 (1985).
\textsuperscript{90} \textit{T.L.O.}, 469 U.S. at 328.
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.} at 329.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.}
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search to be reasonable, and found the defendant delinquent.\textsuperscript{95}

The Appellate Division of the New Jersey Superior Court affirmed the trial court's finding that the search was reasonable, but the New Jersey Supreme Court disagreed, reversed, and ordered suppression of the evidence.\textsuperscript{96} The State of New Jersey sought review by the United States Supreme Court, and certiorari was granted.\textsuperscript{97}

\textit{T.L.O} addressed whether searches by school officials required either a search warrant or probable cause to be reasonable under the Fourth Amendment.\textsuperscript{98} The Court held that public school officials are state actors subject to the Fourth Amendment's prohibitions, and that school children do have a legitimate expectation of privacy, even at school.\textsuperscript{99}

The majority proceeded to apply a traditional balancing test, weighing the privacy expectations of the school children against the school's need to provide for a conducive learning environment.\textsuperscript{100} The majority concluded that the latter interest outweighed the former, at least sufficiently enough to relax the usual restrictions on searches by state authorities.\textsuperscript{101} Rather than imposing a probable cause standard, the Court held that public schools must simply conduct searches in a manner reasonable under all circumstances.\textsuperscript{102} Applying this standard to the facts before it, the Court ruled that the purse search was initiated and conducted reasonably.\textsuperscript{103}

Concurring, Justice Blackmun expressed that the reasonableness of most searches was not for judges to decide.\textsuperscript{104} In his view, the framers of the Constitution had already balanced the considerations and determined that most searches were reasonable only when

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\textsuperscript{95} T.L.O, 469 U.S. at 329-30.
\textsuperscript{96} Id. at 330-31.
\textsuperscript{98} T.L.O, 469 U.S. at 328, 332. The Court had originally granted certiorari based on an exclusionary rule issue, but later determined that more broad Fourth Amendment considerations would have to be included to properly decide the case. Id. at 332.
\textsuperscript{99} Id. at 333-34.
\textsuperscript{100} Id. at 337-42.
\textsuperscript{101} Id. at 341. The Court stated:
We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.
\textit{Id.}
\textsuperscript{102} Id.
\textsuperscript{103} T.L.O., 469 U.S. at 343-47.
\textsuperscript{104} Id. at 351 (Blackmun, J., concurring).
supported by a warrant and/or probable cause.\textsuperscript{105} Justice Blackmun pronounced that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."\textsuperscript{106} Rather than applying a traditional balancing test, which he saw as unnecessary, Justice Blackmun would have held that "[t]he elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers."\textsuperscript{107} He further explained that "[t]he special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable cause requirement."\textsuperscript{108} Hence, the "special needs" terminology was first coined.\textsuperscript{109}

Having only appeared in a concurring opinion, the special needs doctrine was of limited precedential value following \textit{New Jersey v. T.L.O.}\textsuperscript{110} The doctrine came one step closer to enjoying loftier status as accepted law several years later in \textit{O'Connor v. Ortega}.\textsuperscript{111} In \textit{Ortega}, officials at a state hospital searched the office, particularly the desk and filing cabinets, of a managing psychiatrist suspected of some workplace wrongdoings.\textsuperscript{112} The evidence uncovered therefrom was used in administrative proceedings that resulted in the physician's dismissal.\textsuperscript{113}

The psychiatrist sued the officials responsible for the search, alleging that the search was unreasonable and in violation of the Fourth Amendment.\textsuperscript{114} Both parties moved for summary

\textsuperscript{105} \textit{Id.} (Blackmun, J., concurring).

\textsuperscript{106} \textit{Id.} (Blackmun, J., concurring).

\textsuperscript{107} \textit{Id.} at 352 (Blackmun, J., concurring).

\textsuperscript{108} \textit{TL.O.}, 469 U.S. at 353 (Blackmun, J., concurring).

\textsuperscript{109} \textit{Id.} at 351-53 (Blackmun, J., concurring). Justice Blackmun's concurrence, though short (roughly three pages), made use of the "special needs" terminology three times. \textit{Id.} (Blackmun, J., concurring).

\textsuperscript{110} \textit{Id.} at 351 (Blackmun, J., concurring).

\textsuperscript{111} \textit{Id.} at 709 (1987).

\textsuperscript{112} \textit{Ortega}, 480 U.S. at 712-13. Specifically, Dr. Ortega was suspected of coercing residents into contributing funds for a new computer, taking inappropriate disciplinary action against a resident, and sexually harassing two female co-workers. \textit{Id.} at 712.

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.} at 714. Dr. Ortega brought suit pursuant to 42 U.S.C. § 1983. \textit{Id.} This statute is commonly known as The Civil Rights Act, and allows for a private right of action for violation of federal rights. \textit{See} Monroe v. Pape, 365 U.S. 167 (1961); Mitchum v. Foster, 407 U.S. 225 (1972); and \textit{District of Columbia v. Carter}, 409 U.S. 418 (1973). The statute provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage,
judgment. The United States District Court for the Northern District of California granted the hospital's motion, holding that the search was proper, but the Ninth Circuit Court of Appeals disagreed and found the search to be violative of the Fourth Amendment.

The Supreme Court, in a plurality opinion written by Justice O'Connor, found that the physician had a reasonable expectation of privacy in his office, and particularly in his desk and filing cabinets. What remained to be settled was the reasonableness of the search. The Court undertook a discussion indicating that the reasonableness of a search depends upon its context, and therefore can vary from workplace to workplace. Again, the Court applied a balancing test, weighing the employee's reasonable expectations with the employer/government's need for supervision, control, and efficient operation. The Court reiterated that the standard needed to be one of reasonableness under all circumstances. In doing so, Justice O'Connor quoted Justice Blackmun's concurrence in T.L.O. The plurality ended its discussion by concluding that "the 'special needs beyond the normal need for law enforcement make the probable-cause requirement impracticable' for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct." The Court disposed of the case by ruling that summary judgment was improper and remanding the case for further examination into the reasonableness of the search.

of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
Because of the divisive implications of any holding supported by a mere plurality, it would be inaccurate to say the special needs doctrine was clearly adopted in Ortega. However, the Ortega plurality's reiteration of the "special needs" terminology foreshadowed what was soon to come.

Definitive adoption of the special needs doctrine came only a few months after Ortega in Griffin v. Wisconsin. In Griffin, a probation officer, acting on a tip from police and pursuant to a probation regulation that merely required supervisor approval and reasonable grounds for suspicion, searched a probationer's apartment and discovered a handgun. The probationer was subsequently tried and convicted of possession of a firearm by a convicted felon. The trial court denied the probationer's motion to suppress the evidence, concluding that no warrant was needed and that the search was reasonable. Both Wisconsin state courts of appeal affirmed the conviction.

The Supreme Court granted certiorari to decide whether a warrantless search of a probationer's residence violated the reasonableness requirement of the Fourth Amendment. A majority of the Court concluded that the "special needs" of a probation system justified variance from the usual rule that a search be supported by probable cause and/or a warrant. The Court reasoned that a probation program's need for rehabilitation, supervision, protection of the community at large, and a quick response time supported the departure.

In its holding, the majority again quoted Justice Blackmun's concurrence in T.L.O., recognizing that "[a]lthough we usually require that a search be undertaken only pursuant to a warrant, . . . we have permitted exceptions when 'special needs, beyond the normal need for law

were eventually found liable, and the decision was upheld by the Ninth Circuit Court of Appeals, seventeen years after the initial search. Ortega v. O'Connor, 146 F.3d 1149 (9th Cir. 1998).

125. Ortega, 480 U.S. at 711. A plurality opinion is "[a]n opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion." BLACK'S LAW DICTIONARY 1119 (7th ed. 1999).
126. Ortega, 480 U.S. at 725.
127. Griffin, 483 U.S. at 868.
128. Id. at 870-71. Petitioner Joseph Griffin was on probation after being convicted of resisting arrest, disorderly conduct, and obstructing an officer. Id. at 870.
129. Id. at 872. This crime was codified at Wis. Stat. § 941.29(2) (1985-1986). Id.
130. Id.
131. Id.
133. Griffin, 483 U.S. at 873-74. See supra note 86.
134. Id. at 873-77.
enforcement, make the warrant and probable-cause requirement impracticable." The special needs doctrine was thereby officially and definitively adopted by a majority of the Court.

Since Griffin, four Supreme Court cases have considered the application of the special needs doctrine to warrantless drug testing situations comparable to that of Ferguson. The first two, Skinner v. Railway Executives' Ass'n and National Treasury Employees v. Von Raab, were argued and decided in tandem.

In Skinner, the Court upheld a Federal Railroad Administration regulation that allowed suspicionless drug testing of railroad employees. The "special need" cited by the majority in its approval of the policy was the government's interest in ensuring public safety. Quoting Griffin, the majority held that:

The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school or prison, "likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." Furthermore, the testing passed Fourth Amendment muster because the industry was already highly regulated for safety reasons, so employees should already have had a diminished expectation of privacy. In this case, not even the lack of individualized suspicion was enough to make the search unreasonable.

Argued and decided on the same day as Skinner was National Treasury Employees v. Von Raab. In Von Raab, the Court

135. Id. at 873 (quoting T.L.O., 469 U.S. at 351 (Blackmun, J., concurring)).
136. Id.
137. Skinner, 489 U.S. at 602; Von Raab, 489 U.S. at 656; Acton, 515 U.S. at 646; Chandler, 520 U.S. at 305.
139. Skinner, 489 U.S. at 634.
140. Id. at 628. The majority of the Court explained that "[e]mployees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Id.
141. Id. at 620.
142. Id. at 627.
143. Id. at 624. The majority noted, "[w]e made it clear . . . that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." Id. (citing United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976)).
144. Von Raab, 489 U.S. at 656.
"granted certiorari to decide whether it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions." The positions referred to required the employee to either carry a gun, handle classified materials, or become directly involved in drug interdiction. Through their employment union, some of these employees sued, alleging that the policy violated the Fourth Amendment because it did not contain any requirement of suspicion or probable cause.

The Court concluded that the drug testing constituted a reasonable search because "the Government has a compelling interest in ensuring that front line interdiction personnel are physically fit and have unimpeachable integrity and judgment." The majority also cited, as a "special need," the risk to the life of the citizenry posed by potential use of deadly force by persons suffering from impaired perception and judgment due to drug use. According to the majority, these "special needs" outweighed the expectations of privacy that any such employee could legitimately have as a servant of a governmental law enforcement agency. For the second time that day, the Court asserted that:

[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

The Customs Service policy was upheld.

Five years later, the Court revisited and further developed the special needs doctrine in the context of drug testing in *Vernonia School Dist. 47J v. Acton.* This time, the setting was a state school district that had adopted a random drug testing policy for student athletes. Having discovered some drug use among its

145. *Id.* at 669.
146. *Id.* at 660-61.
147. *Id.* at 663.
148. *Id.* at 670.
149. *Von Raab,* 489 U.S. at 671.
150. *Id.* at 671-72.
151. *Id.* at 665-66.
152. *Id.* at 679.
153. *Acton,* 515 U.S. at 646.
154. *Id.* at 648.
student athletes (through some students' own admissions), the school authorized random urinalysis drug tests of any student member of the school's athletic teams. One student, who refused testing and therefore was prevented from joining the football team, sued the school district contending that the searches were suspicionless and unconstitutional under the Fourth Amendment.

Continuing its expansion of the special needs doctrine, the Court ruled that the "special needs" of deterring schoolchildren from drug use outweighed an individual student's interest in privacy. Writing for the majority, Justice Scalia noted that "[a] search unsupported by probable cause can be constitutional." He quoted the familiar special needs language from Griffin, specifically indicating that "special needs" are particularly apt to exist in the public-school arena. Thus, another form of suspicionless drug testing was held to be constitutional under the special needs doctrine under the Fourth Amendment.

The Supreme Court's last word, preceding Ferguson, concerning warrantless drug testing and the special needs doctrine came in 1997 in Chandler v. Miller. Georgia had enacted a statute requiring candidates for certain state offices to undergo, or certify that they had recently undergone, urinalysis drug testing before election and appointment. Some nominees brought suit against the Governor and two other officials, alleging a Fourth Amendment violation. The District Court for the Northern District of Georgia and the Eleventh Circuit Court of Appeals both relied on the Supreme Court's "special needs" precedents and determined that the drug tests were valid under the Fourth Amendment.

When the case came before the Supreme Court, the majority of the justices concluded, for the first time in the "special needs" line, that a state sponsored suspicionless drug testing policy was not justified by the government's purported "special needs." The

155. Id. at 648-50.
156. Id. at 651.
157. Id. at 664-65. The Court stated: "Taking into account all the factors we have considered above — the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search — we conclude that Vernonia's Policy is reasonable and hence constitutional." Id.
158. Acton, 515 U.S. at 653.
159. Id. See supra note 135 and accompanying text.
160. Id. at 664-65.
161. Chandler, 520 U.S. at 305.
162. Id. at 309.
163. Id. at 310.
164. Id. at 311-12.
165. Id. at 322. In full, the Court remarked, "[t]he need revealed, in short, is symbolic,
Court held that "[n]o precedent suggest[s] that a State's power to establish qualifications for state offices . . . diminishes the constraints on state action imposed by the Fourth Amendment." Though the Court opined that the intrusion on the individual candidates' privacy was relatively minor, it claimed that Georgia failed to demonstrate any special needs substantial enough to justify variance from the usual Fourth Amendment requirement of some individualized suspicion.

In making its determination, the Court was influenced by the state's total lack of suspicion of the class in general. It distinguished Chandler from Von Raab, Skinner and Acton on the basis that Georgia had absolutely no evidence of drug abuse among its elected officials. In fact, Georgia readily admitted in its oral argument that the statute was not a response to any specific suspicion or fear. The Court called Georgia's purported needs "symbolic, not 'special.'" As a result, the majority opinion was devoted to clarifying that "special needs" are found only in unique circumstances. The statute was struck down as violative of, and unreasonable under, the Fourth Amendment.

After examining the Court's holding in Ferguson, placing the decision in context with the cases which preceded Ferguson (particularly Chandler), it is clear that, presently, the Supreme Court has moved towards limiting the application of the special needs doctrine as it is applied to drug tests lacking the support of a warrant or probable cause. Having expanded the doctrine for over ten years, the Court in its past two reviews of the doctrine has identified Fourth Amendment violations. Notably, these were first two times the Court has done so in the history of the doctrine's application to drug testing.

166. Chandler, 520 U.S. at 317.
167. Id. at 318.
168. Id. at 318-19. The Court observed that "[n]otably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule. Nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity." Id.
169. Id. at 319.
170. Id.
171. Chandler, 520 U.S. at 322. See supra note 165.
172. Id. at 318. The Court noted: "Our precedents establish that the proffered special need for drug testing must be substantial — important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." Id.
173. Id. at 323.
174. See Chandler and Ferguson, discussed supra.
In any event, it is difficult to argue with the result of Ferguson. The privacy expectations of the affected mothers were largely ignored, particularly in light of the physician-patient relationship.\footnote{175} This situation was not akin to one in which medical personnel inadvertently discover drug use through a urinalysis test taken for independent treatment purposes, and are bound by ethical rules and mandatory reporting laws to report the same. In fact, the Court deliberately took the time to verify that such mandatory reporting laws and actions undertaken thereto remain valid.\footnote{176}

The stance taken by the Supreme Court in Ferguson should also not be shocking considering the magnitude of police involvement. As the Court itself seemed to recognize, this is the strongest footing on which the decision stands.\footnote{177} In fact, if not for the extensive role that law enforcement played in the scheme, the Court could quite easily have ruled the other way, finding that weaning pregnant women from drugs was a valid "special need" entitled to relaxed Fourth Amendment search restrictions. It is difficult to understand how curbing the drug use of pregnant women is any less "special" than curbing the drug use of high school students.\footnote{178} In either case, the "special need" is arguably the health and well being of children. However, because of the extreme nature of the law enforcement involvement in Ferguson, the Court was able to draw a line and flag a situation that exceeded the special needs doctrine's allowances. The Court wisely used this opportunity to impose a limit on the expanding special needs doctrine, though at the same time leaving some room to distinguish

\footnote{175} Ferguson, 532 U.S. at 78. See supra note 42.
\footnote{176} Id. at 78 n.13. The Court commented: There are some circumstances in which state hospital employees, like other citizens, may have a duty to provide law enforcement officials with evidence of criminal conduct acquired in the course of routine treatment . . . While the existence of such laws might lead a patient to expect that members of the hospital staff might turn over evidence acquired in the course of treatment to which the patient had consented, they surely would not lead a patient to anticipate that hospital staff would intentionally set out to obtain incriminating evidence from their patients for law enforcement purposes. Id.
\footnote{177} Id. at 79-80. The Court indicated that: [t]he critical difference between those four drug-testing cases and this one, however, lies in the nature of the "special need" asserted in justification for the warrantless searches. In each of those earlier cases, the "special need" that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement . . . In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce patients into substance abuse treatment. Id.
\footnote{178} See Acton, 515 U.S. at 646 and T.L.O., 469 U.S. at 325.
with respect to future "special needs" cases where police involvement may not be so extensive. Perhaps the fact pattern and timing of *Ferguson* was simply ideal for exacting such a limit. Distinguishing future cases from *Ferguson* is certainly plausible.

The opinion will also likely prove to be correct in its practical effects. The holding may well do more to achieve the "ultimate" goals of Policy M-7 (care of mother and child, as opposed to what the Court found to be its "immediate goal" of law enforcement) than Policy M-7 itself. Some, possibly even the Court, would argue that a ruling in favor of Policy M-7 would have actually been injurious to the health and welfare of drug-abusing mothers and their babies.\(^{179}\) That argument would contend that upholding the tactics employed by MUSC would have actually discouraged drug-using mothers from seeking prenatal treatment at all.\(^{180}\) Such a result would obviously not be beneficial to any party, including law enforcement (because then drug-use would have to be discovered by other means). In addition, few would argue that a prison is the proper environment for mother or child.\(^{181}\) Additionally, others

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179. *Ferguson*, 532 U.S. at 78-79 n.14. The majority commented that "we have previously recognized that an intrusion on [the expectation of privacy of hospital patients] may have adverse consequences because it may deter patients from receiving needed medical care." *Id.* (citing Whalen v. Roe, 429 U.S. 589, 599-600 (1977)). See also Jean R. Schroedel & Pamela Fiber, *Punitive Versus Public Health Oriented Responses to Drug Use by Pregnant Women*, 1 YALE J. OF HEALTH POL'Y, L AND ETHICS 217, 220 (2001). The authors observed: "Critics charge the test and arrest approach followed in Charleston is both bad law and ineffective public policy. Forcing doctors at public hospital to participate in the policy violates the confidential nature of the physician-patient relationship and threatens the reproductive freedom of women." *Id.* (citing Carmen Vaughn, *Circumventing the Fourth Amendment via the Special Needs Doctrine to Prosecute Pregnant Drug Users: Ferguson v. City of Charleston*, 51 S.C. L. REV. 887 (2000)). The article further states, "[m]oreover, critics argue that pregnant users will avoid seeking prenatal care out of fear of prosecution." *Id.* (citing Jean R. Schroedel, *Is THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES* 102 (2000); and American Medical Association Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2667 (1990)). See also Brody & McMillan, *supra* note 17, at 254. The authors proclaim:

As with many other state policies aimed at protecting an unborn child, the mandatory reporting requirements tend to have acutely negative consequences to both the mother and the fetus. If a pregnant drug-dependent woman is afraid that her doctor will learn about her drug usage and report it, chances are good that she will simply avoid seeking the prenatal care that is vital to her giving birth to a healthy baby. Additionally, even if she does seek medical care, she is not likely to inform her doctor of her drug use for fear of punishment or the removal of her children stemming from state-mandated reporting.

*Id.* (citing Barry M. Lester et al., *Keeping Mothers and Their Infants Together: Barriers and Solutions*, 22 N.Y.U. REV. L & SOC. CHANGE 425, 434 (1996); and D.A. Frank et al., *Cocaine Use During Pregnancy: Prevalence and Correlates*, 82 PEDIATRICS 888, 888-95 (1988)).


181. One article contends that "incarceration actually works against the goal of
would argue that the policy could have been struck down on
discriminatory grounds.\textsuperscript{182}

Certainly for hospitals, the \textit{Ferguson} case requires an evaluation
of any similar policies. First, importantly, the extent and degree of
law enforcement participation will have to be examined. But more
significantly, though perhaps more subtly, courts and affected
parties should interpret \textit{Ferguson} to require scrutiny of future
non-law enforcement state drug testing scenarios from a motive
perspective. As noted, the Court could have easily been swayed to
an opposite decision had it been convinced that the primary
purpose for the search was the treatment of mother and child,
rather than law enforcement. It must be remembered that since its
inception, the special needs doctrine, despite its abbreviated name,
has been about more than just special needs; it has been about
\textit{non-law enforcement} special needs.

\textit{Nicholas J. Zidik}

\textsuperscript{182} Debatably, "[t]he policy discriminates against poor and minority women because
they are more likely to visit a state hospital than a private hospital." Schroedel & Fiber, \textit{supra} note 179, at 220.